Electronically Filed
Docket: 21-CRB-0001-PR (2023-2027)
Filing Date: 08/06/2021 10:00:00 PM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

GOOGLE'S REPLY IN SUPPORT OF SERVICES' MOTION TO ACCESS AND TO MAKE USE OF THE RESTRICTED *WEBCASTING V* INITIAL DETERMINATION AND FUTURE SUBSTANTIVE RULINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

I. INTRODUCTION

SoundExchange's position that certain outside counsel—and in particular, one of Google's outside lawyers—should be "screened" from the *Webcasting V* Materials has caused, and continues to cause, significant harm to Google. Each day that passes is another day Google's lawyers lack access to information necessary for meaningful participation in this proceeding.

SoundExchange's Opposition does not dispute the importance of this information. Nor does it dispute the need for every participant, through outside counsel, to have access. In fact, SoundExchange has stipulated to access for every other lawyer in this or other proceedings.

Nevertheless, SoundExchange argues that its "concern" about hypothetical misuse of "Licensing Information" justifies singling out one of Google's outside lawyers and denying him access to this information during the course of his representation of Google. SoundExchange acknowledges that Google's outside lawyer, Gary Greenstein of Wilson Sonsini, has never been accused of violating any order. And it does not question that he will faithfully abide by both the *Webcasting V* and *Phonorecords IV* Protective Orders and that he would not intentionally misuse any confidential information. All SoundExchange points to is a generalized fear that information about its strategies could be subconsciously used in other contexts.

That is not a valid reason to deny access to Mr. Greenstein or to deny Google its choice of representation. This type of amorphous concern has consistently been rejected as a basis for preventing outside counsel access to confidential licensing information under the prevailing "competitive decision-maker" standard. Mr. Greenstein is not a competitive decision-maker for Google—or for any of the other companies he represents—and there is no precedent for SoundExchange's extreme and unwarranted demand to exclude outside counsel whose ethics are above reproach and—undisputedly—not remotely in question.

SoundExchange's purported justification for objection is not only disingenuous, but also arbitrary. Mr. Greenstein is not the only lawyer whose practice includes negotiating license agreements with sound recording companies on behalf of digital music services. Yet, SoundExchange has stipulated to access for other lawyers in this proceeding without objection. When asked to differentiate between Mr. Greenstein and other lawyers during a meet and confer, SoundExchange was unable to provide any coherent response. The Judges should reject this unwarranted effort to hamstring one of the participants in this proceeding.

II. SOUNDEXCHANGE DOES NOT DISPUTE THAT ACCESS TO THE *WEB V* MATERIALS IS NECESSARY TO PARTICIPATE IN THIS PROCEEDING AND THAT GOOGLE WOULD BE PREJUDICED IF DENIED THAT ACCESS

Access to the *Webcasting V* Materials is critical for Google's participation in this proceeding. All prior determinations of the Copyright Royalty Judges are precedential and binding. 17 U.S.C. § 803(a)(1). SoundExchange's proposed restriction, however, greatly limits Google's counsel's ability to represent it. Google would be deprived of its due process rights if its counsel is not provided with access to the entirety of the prior determinations. *See Adir Int'l, Ltd. Liab. Co. v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1039 (9th Cir. 2021).

Given the rapidly approaching deadlines for preparation of direct cases, SoundExchange stipulated to allow other counsel in this proceeding access to these Materials, except Google's outside attorneys pending the Board's decision on this Motion. Google, of course, faces the same rapidly approaching deadlines. This puts Google at an unfair disadvantage. SoundExchange later offered to grant other attorneys at Google's outside law firm access to the Materials, as long as Mr. Greenstein was screened from the information pending the ruling on this Motion. This does not, however, avoid the problem. SoundExchange is still denying access to Google's lead outside counsel. The "screening" proposal does nothing but invite future mischief over what may or may not have been derived from restricted material and shared between lawyers at the same firm

continuing to work on the same matter. This is nothing like the prophylactic screens firms typically employ and itself inflicts a practical burden solely on Google.

SoundExchange's suggestion that Google instead use only outside counsel who are not involved in negotiating licenses ultimately denies Google its right to choose counsel. *See* Opp. at 5; *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 186 (3d Cir. 2005) (right to select attorney); *SEC v. Csapo*, 1974 U.S. Dist. LEXIS 7381, at *5 (July 30, 1974), *aff'd* 522 F.2d 7 (D.C. Cir. 1976) (same). Having transactional experience in music licensing is not something that should disqualify a lawyer, but rather should be sought after in a proceeding where the governing standard is what a willing buyer and seller would agree to. Participants should be able to engage outside lawyers with experience to provide guidance in shaping their arguments to the Board.

III. SOUNDEXCHANGE HAS NOT IDENTIFIED ANY VALID BASIS FOR DENYING GOOGLE'S LAWYERS ACCESS TO THIS INFORMATION

To restrict access, SoundExchange must make a concrete, particularized showing of any prejudice that it would suffer if its Licensing Information is shared with Google's counsel. *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 274-75 (D.D.C. 2001). This requires "specific facts," not "speculative and conclusory statements." *Id.*; *English v. Wash. Metro. Area Transit Auth.*, 323 F.R.D. 1, 8 (D.D.C. 2017). SoundExchange fails to meet this standard.

A. Any Legitimate Concern is Adequately Protected Against by the *Webcasting V* and *Phonorecords IV* Protective Orders.

SoundExchange and the major record label participants claim they relied on the *Webcasting V* Protective Order in making decisions about the use of their information during that proceeding. Opp. at 6. But both the *Webcasting V* and *Phonorecords IV* Protective Orders will continue to protect any legitimate interest SoundExchange may have over the disclosure and use of its Licensing Information. The Services have agreed to treat the *Webcasting V* Materials as Restricted under both Protective Orders (Mot. at 1–2), which mandate that only outside counsel

and experts in this proceeding will have access to these materials.[1] The Services have also agreed that the more restrictive provision will control if there is a conflict between the Protective Orders. *Id.* at 2 n.2. SoundExchange's information is thus amply protected.

B. Fear That Someone Will Violate the Protective Order—Without More—Does Not Justify Denying Access

In evaluating restrictions on access to confidential business information, courts look to whether the individual is involved in competitive decision-making. *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992) (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). This requires more than giving legal advice; it requires participation in making the client's business decisions. *U.S. Steel*, 730 F.2d at 1468 n.3.

Courts have sometimes found that an ***in-house*** lawyer at a corporation can be a competitive decision-maker if they have a business role beyond providing legal advice. *Intel Corp. v. VIA Techs., Inc*., 198 F.R.D. 525, 531 (N.D. Cal. 2000) (citing *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)) ("'In-house counsel stand in a unique relationship to the corporation in which they are employed . . . . often intimately involv[ing] them in the management and operation of the corporation. . . .'"). In *Intel*, for example, in-house counsel oversaw patent litigation, evaluated whether to enter settlement and license agreements, and directly reported to an "Intel Vice–President involved in competitive decision-making who has been denied access to confidential information by courts in other similar cases." *Intel*, 198 F.R.D. at 530. Tellingly, SoundExchange has not cited a single case excluding ***outside*** counsel from accessing confidential licensing information under the competitive decision-maker standard. That is not surprising, since one would not expect outside counsel to make the actual competitive business decisions for clients.

[1] Protective Order at Section IV.B, *Phono IV*, Docket No. 21-CRB-0001-PR (2023-2027) (July 20, 2021); Protective Order at Section IV.B, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (June 24, 2019).

Mr. Greenstein is not a competitive decision-maker for Google (or any of his clients). Greenstein Decl. ¶ 5. As an outside lawyer, he advises but does not make business decisions for his clients, and is not "involved in the management and operation" (*Exxon*, 636 F.2d at 1350) of any client. *Id*. SoundExchange offers no evidence otherwise. It only makes conclusory statements that disclosure to Mr. Greenstein "could" be worse than disclosure to actual employees of the participants because he "may" represent, in negotiations, other digital music services besides Google. Opp. at 3. But representing clients in negotiations as outside counsel is nowhere close to the type of "competitive decision-making" that could even potentially be a basis for seeking access restriction.

SoundExchange speculates that inadvertent disclosure could occur. Its "what-ifs" fall far short of meeting the applicable standard for limiting disclosure of information. Thus, for example, when UMG Recordings sought to prevent opposing attorneys and experts from accessing information based on "fears" that they "may potentially use the information in violation of the protective order," the court rejected its position, finding that these concerns "do[] not withstand scrutiny." *James v. UMG Recordings, Inc*., 2013 U.S. Dist. LEXIS 66488, at *8, 10 (N.D. Cal. May 9, 2013); *see also U.S. Steel*, 730 F.2d at 1467 (vacating order denying access to in-house counsel based on "risk of *inadvertent* disclosure"); *Warner Chilcott Labs. Ir. Ltd. v. Impax Labs., Inc.*, 2009 U.S. Dist. LEXIS 100864, at *14 (D.N.J. Oct. 29, 2009).

This Court has placed and should continue to place the burden of proof on the party seeking to deny access. Indeed, when SoundExchange sought access to the *Phonorecords III* determination and testimony for use in the *Webcasting V* proceeding, Amazon opposed giving access to its information. The Judges required that Amazon identify all specific instances of its restricted information and explain why each provision of the *Webcasting V* and *Phonorecords III*

Protective Orders was insufficient for each restricted item.[2] At minimum, SoundExchange should be held to the same burden and be required to explain why the Protective Orders are insufficient to protect each restricted item in the *Webcasting V* Materials. It has not.

C. Concerns About Unintentional Use of General Knowledge About Negotiation Strategy Are Not a Legitimate Basis for Denying Access

SoundExchange concedes that it does not believe any lawyer in this proceeding—including Gary Greenstein—would intentionally violate the Protective Order. Opp. at 9, 12. Rather, its concern is that Mr. Greenstein will subconsciously use restricted information because human minds cannot be "compartmentalized." *Id*. at 9–13.

This abstract concern is not a legitimate basis for denying access. As noted above, courts will only restrict access to protect specific information for concrete reasons. But the Protective Orders already prevent the use of any specific information outside the proceeding. Amorphous concerns about an employee's general knowledge or speculation about "inevitable disclosure" of secrets have been rejected as bases for preventing departing employees from working for their prior employers' competitors. *See, e.g.*, *Saturn Wireless Consulting, LLC v. Aversa*, 2017 U.S. Dist. LEXIS 65371, at *34 (D.N.J. Apr. 26, 2017); *ADP, LLC v. Rafferty*, 923 F.3d 113, 121 (3d Cir. 2019). Employees have much deeper knowledge of specific licensing strategies than outside lawyers could, and yet can be and have frequently been hired to work for their employer's competitors.[3] In view of this, there is no reason that any outside lawyer identified by SoundExchange should be "screened" based on its amorphous, speculative concerns.

---

[2] *See* Order Granting in Part Motion for Access to Restricted *Phonorecords III* Materials at 5, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 13, 2019).

[3] *See, e.g.*, *Oana Ruxandra Named Chief Digital Officer & EVP, Business Development at Warner Music Group*, https://www.musicbusinessworldwide.com/oana-ruxandra-named-chief-digital-officer-evp-business-development-at-warner-music-group/ (Apr. 16, 2020); *Apple hires Warner Music veteran for business development at streaming unit*, https://www.reuters.com/article/us-apple-music/apple-hires-warner-music-veteran-for-business-development-at-streaming-unit-idUSKBN2052AN (Feb. 11, 2020); *Sony Music beefs up digital exec ranks*,

IV. SOUNDEXCHANGE UNFAIRLY AND ARBITRARILY TARGETS GARY GREENSTEIN

A. Mr. Greenstein Has an Impeccable Track Record in CRB Proceedings.

SoundExchange specifically names Gary Greenstein as the cause of its purported fear, citing his regular involvement in licensing negotiations with sound recording companies on behalf of digital music services. Opp. at 11-12. But Mr. Greenstein has been involved in many CRB proceedings, including *Webcasting IV*, *Phonorecords III*, and *BES II* and *III*, during which his practice has always been transactional and focused on negotiations between potential counterparties. Greenstein Decl., ¶ 6. Yet, no such objection has ever been made against him in any prior CRB proceeding. *Id*.

Mr. Greenstein has never been cited for compliance issues with any orders and there has never been even a hint of breach. *Id*. SoundExchange goes out of its way to acknowledge that it "does not mean to call Mr. Greenstein's ethics into question or suggest that he would not try to comply with his obligations." Opp. at 12. Thus, it is entirely meritless to suggest that disclosing Licensing Information to Mr. Greenstein—who has an impeccable track record in prior CRB proceedings—would suddenly result in any competitive disadvantage to SoundExchange or any record label participant in *Webcasting V*.

B. The Objection Disingenuously and Arbitrarily Targets Mr. Greenstein.

SoundExchange suggests that allowing Mr. Greenstein access to the *Webcasting V* Materials creates "an untenable risk," but does not identify any other similarly situated counsel for screening. Opp. at 12. SoundExchange makes no mention of any of the other counsel of record in *Webcasting V* or *Phonorecords IV* who have substantial transactional practices, such as

https://variety.com/2013/music/news/sony-music-beefs-up-digital-exec-ranks-1118064681/ (Jan. 15, 2013); Ron Wilcox, SoundExchange, https://www.soundexchange.com/about/our-team/board-of-directors/ron-wilcox/.

Benjamin Marks and Todd Larson (Pandora), Richard Assmus, John Mancini, and Margaret Wheeler-Frothingham (Spotify), Claudia Ray (Apple), and Kenneth Steinthal (Google)—all of whom have IP, transactional, and/or music licensing practices.[4] It has instead stipulated to their access without objection. When asked to explain this disparate treatment, SoundExchange was unable to provide any explanation whatsoever. Greenstein Decl. ¶ 12.[5]

Like many other outside lawyers in this proceeding, Mr. Greenstein is well-suited to advise and provide representation because of his years of expertise in the market—not because he might be privy to confidential bargaining information. Mr. Greenstein's transactional practice has made him well-versed in such issues, especially in the realm of willing buyer/willing seller negotiations. Indeed, Mr. Greenstein ***already*** understands "how the Record Labels approach licensing negotiations" and their "bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto" (Opp. at 2) from his many negotiations for and against sound recording companies. *Id*., ¶ 11. It is hard to fathom that anything in the *Webcasting V* Materials will be so revelatory or new that Mr. Greenstein does not already know it from his tenure as the first General Counsel at SoundExchange, VP of Business and Legal Affairs at the Recording Industry Association of America, or outside counsel to Universal Music Group. *See id*., ¶¶ 8–10.

[4] *See Benjamin E. Marks*, Weil, https://www.weil.com/people/benjamin-marks; *Todd Larson*, Weil, https://www.weil.com/people/todd-larson; *Richard M. Assmus*, Mayer Brown, https://www.mayerbrown.com/en/people/a/assmus-richard-m?tab=overview; *A. John P. Mancini*, Mayer Brown, https://www.mayerbrown.com/en/people/m/mancini-a-john-p?tab=overview; *Margaret L. Wheeler-Frothingham*, Mayer Brown, https://www.mayerbrown.com/en/people/w/margaret-wheeler-frothingham?tab=overview; *Kenneth L Steinhal*, King & Spalding, https://www.kslaw.com/people/kenneth-steinthal?locale=en.

[5] Under SoundExchange's logic, its own lawyer in *Webcasting V*, Steven Englund, should be screened. *See Steven Englund,* Jenner & Block, https://jenner.com/people/StevenEnglund.

V. CONCLUSION

For all of the reasons set forth in the Services' Motion and above, the Services' Motion should be GRANTED.

August 6, 2021

Respectfully submitted,

/s/ Lisa D. Zang
Lisa D. Zang (CA Bar No. 294493)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-1650
(323) 210-2923
lzang@wsgr.com

Attorneys for Google LLC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

DECLARATION OF GARY R. GREENSTEIN IN SUPPORT OF GOOGLE'S REPLY IN SUPPORT OF SERVICES' MOTION TO ACCESS AND TO MAKE USE OF RESTRICTED *WEBCASTING V* INITIAL DETERMINATION AND FUTURE SUBSTANTIVE RULINGS

I, Gary R. Greenstein, declare as follows:

1. I am an attorney duly licensed to practice in California and the District of Columbia. I have been practicing law for approximately 25 years. I am a partner at the law firm Wilson Sonsini Goodrich & Rosati, and serve as outside counsel for Google LLC ("Google") in the above-captioned matter.

2. I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

3. I joined Wilson Sonsini in July 2007 and have been a partner since February 2013. I am a technology transactions practitioner, and regularly represent digital media and entertainment clients.

4. I am lead counsel for this case based on my transactional experience in music licensing. I have been deeply involved in the preparation of this litigation, and intend to have an active role in the discovery and trial of the case. I expect to review deposition transcripts, write

briefs, and otherwise participate in the litigation. It would be a hardship to Google's ability to proceed in this case if I were not able to review pertinent documents.

5. I am not involved in competitive decision-making for Google or for any client or anyone affiliated with any client. I do not make business decisions for my clients and do not have authority to bind my clients in license negotiations.

PARTICIPATION IN PRIOR PROCEEDINGS

6. I have participated in many Copyright Royalty Board ("CRB" or "Board") and Copyright Arbitration Royalty Panel ("CARP") proceedings throughout my career, including the sound recording rate proceedings *Webcasting I&II* (1998-2002), *Webcasting IV* (2016-2020), *Phonorecords III*, *BES II* (2014-2018), and *BES III* (2019-2023) while in private practice during which my practice has primarily been transactional and where I have regularly negotiated license agreements with parties adverse to my clients in rate proceedings. In the CRB proceedings where I have appeared as counsel to a participant, no objection has ever been made to my receipt of confidential information under a protective order. I have never been cited for compliance issues with any orders and there has never been any hint of a breach of my ethical obligation to maintain client confidences or comply with the terms of a protective order.

7. I am fully aware of and have always complied with obligations imposed by protective orders adopted by the Board and predecessor CARPs in rate proceedings to only use information learned during those proceedings for the purposes of those proceedings. I have abided by the terms of the protective orders in every case in which I have served as counsel to a participant and continue to do so in this case.

TRANSACTIONAL EXPERIENCE

8. From November 1996 to January 2001, while an associate at Arnold & Porter, I represented, among others, Universal Music Group and the Recording Industry Association of America ("RIAA") as outside counsel.

9. From January 2001 to February 2005, I held the position of Vice President of Business and Legal Affairs at the RIAA.

10. From February 2005 to December 2006, I served as the first General Counsel at SoundExchange.

11. I already understand how the Record Labels approach licensing negotiations in general and with particular Digital Streaming Platforms ("DSPs"), including bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto from many negotiations with sound recording companies.

MEET AND CONFER WITH SOUNDEXCHANGE

12. During a meet and confer on July 15, 2021, I asked counsel for SoundExchange to explain the disparate treatment against me in this matter. I pointed out other counsel of record who are involved in transactional work. Counsel for SoundExchange did not offer any explanation as to the reason for the disparate treatment, and instead only stated that the concern is over the information going to the outside counsels' respective clients. I reiterated to counsel for SoundExchange that the protective order already provides that access to the *Webcasting V* Materials is solely for outside counsel—not the clients.

WEBCASTING V AND *PHONORECORDS IV* PROTECTIVE ORDERS

13. I have read and am familiar with the terms of the Protective Orders in both the *Webcasting V* and *Phonorecords IV* proceedings. As Google's counsel, I am subject to the

restrictions of the Protective Orders. I am unaware of what the restricted information in the *Webcasting V* Materials include, however, I am aware that I am prohibited from using any of the restricted information obtained in this proceeding for any purpose other than representing Google in *Phonorecords IV*.

14. If I am permitted to view the *Webcasting V* Materials, I agree to abide by the terms set forth in the *Webcasting V* and *Phonorecords IV* Protective Orders.

I declare under the penalty of perjury under the law of the United States of America that the foregoing is true and correct.

August 6, 2021

Respectfully submitted,

/s/ Gary R. Greenstein

Gary R. Greenstein (DC Bar No. 455549)
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, N.W., 5th Floor
Washington D.C. 20006
(202) 973-8849
ggreenstein@wsgr.com

Proof of Delivery

I hereby certify that on Friday, August 06, 2021, I provided a true and correct copy of the Google's Reply In Support of Services' Motion to Access and to Make Use of the Restricted Webcasting V Initial Determination and Future Substantive Rulings to the following:

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Signed: /s/ Lisa Zang